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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

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AGENDA ITEM
For Meeting of: 03-09-06

MEMORANDUM

TO: The Commission
General Counsel
Staff Director
Office of the Commission Secretary

FROM: Vice Chairman Robert D. Lenhard
Commissioner Hans A. von Spakovsky

DATE: March 8, 2006

RE: Advisory Opinion 2006-06

SUBMITTED LATE

Attached please find a proposed draft of Advisory Opinion 2006-06 we plan to offer at the Commission's open session on March 9, 2006.

1 **ADVISORY OPINION 2006-06**

2
3 **Mr. Brandon Hall**
4 **Campaign Manager**
5 **Busby for Congress**
6 **P.O. Box 712**
7 **Cardiff by the Sea, CA 92007**

8
9 **Dear Mr. Hall:**

10
11 **We are responding to your advisory opinion request on behalf of Francine Busby**
12 **for Congress (“the Committee”) concerning the application of the Federal Election**
13 **Campaign Act of 1971, as amended (“the Act”), and Commission regulations to the**
14 **upcoming special general election in California’s 50th Congressional District. Because**
15 **Ms. Busby is participating in the special general election, all expenditures from personal**
16 **funds that she or her opponent(s) in the special general election made or make between**
17 **November 3, 2004 and April 11, 2006, must be aggregated as expenditures for the special**
18 **general election, for Millionaires’ Amendment purposes. The application of the**
19 **Millionaires’ Amendment provisions between April 12, 2006 and June 6, 2006 vary**
20 **depending on whether there are two elections on June 6, 2006 or just one, as discussed in**
21 **greater detail below.**

22 ***Background***

23 **The facts presented in this advisory opinion are based on your letter received on**
24 **February 14, 2006.**

25 **The Committee is the principal campaign committee of Francine Busby, a**
26 **candidate for Congress in California’s 50th Congressional District. She is a candidate**
27 **both in the special general election to replace former Congressman Randy “Duke”**
28 **Cunningham for the remainder of the 109th Congress (“Special General Election”), and in**

1 the regular primary election to nominate a Democratic Party candidate for the same seat
2 in the 110th Congress ("Primary Election").

3 Under California law, the Special General Election will be held on April 11, 2006.
4 That election is open to all qualified candidates, regardless of party affiliation. If a
5 candidate receives a majority of the votes cast, he or she will be declared the winner. If
6 no candidate receives a majority of the votes cast, then a runoff election will be held
7 among the top vote-getters of each qualified political party. At present, two Democratic
8 candidates, several Republican candidates, and one Libertarian candidate are on the ballot
9 in the Special General Election.

10 Should a runoff election ("Special General Runoff") be required, it will be held on
11 June 6, 2006 – the same day as the Primary Election. Unlike the Special General
12 Election, in the Primary Election the candidates of each political party are only running
13 against each other for their party's nomination. Most, if not all, of the candidates
14 currently running in the Special General Election are also running in the Primary Election
15 for their respective political party's nomination.

16

17 ***Question Presented***

18 *How do the provisions of the Millionaires' Amendment apply to the April 11, 2006,*
19 *Special General Election and the June 6, 2006, Primary Election in California's 50th*
20 *Congressional District?*

21

1 ***Legal Analysis and Conclusions***

2 On November 6, 2002, the Bipartisan Campaign Reform Act of 2002, Pub. L. No.
3 107-155, 116 Stat. 81 (2002) ("BCRA") took effect. As amended by BCRA, the Act
4 contains a set of provisions collectively referred to as the "Millionaires' Amendment."
5 See 2 U.S.C. 441a(i) and 441a-1. The Millionaires' Amendment provisions applicable to
6 elections for the United States House of Representatives are set forth in 2 U.S.C. 441a-1.¹
7 See also 11 CFR 400.21(b), 400.31(e), and 400.41.

8 Under the Millionaires' Amendment, candidates may solicit, receive, and spend
9 contributions from individuals exceeding the contribution limit in 2 U.S.C. 441a(a)(1)(A)
10 if they are running against self-financed candidates who make expenditures from their
11 personal funds that exceed certain amounts. See 2 U.S.C. 441a-1(a)(1)(A) and 11 CFR
12 400.41(b)(1). Additionally, national and State party committees may make coordinated
13 party expenditures in excess of the normally applicable coordinated party expenditure
14 limit, in 2 U.S.C. 441a(d), on behalf of candidates opposing self-financed candidates.
15 See 2 U.S.C. 441a-1(a)(1)(C) and 11 CFR 400.41(b)(2). The Millionaires' Amendment
16 also requires that candidates and/or their principal campaign committees comply with a
17 number of new reporting and notification requirements. See, e.g., 2 U.S.C. 441a-1(b) and
18 11 CFR 400.20, 400.21, 400.22, and 400.30(b)(2).

19 The provisions of the Millionaires' Amendment apply separately to each
20 election cycle. See 2 U.S.C. 431(25) and 11 CFR 400.2(a). For Millionaires'

¹ The Millionaires' Amendment contains separate provisions for candidates for the U.S. House of Representatives and candidates for the U.S. Senate. Because you are a candidate for the U.S. House of Representatives, this advisory opinion refers only to the provisions that address candidates for the U.S. House of Representatives.

1 Amendment purposes, an "election cycle" is defined as the period beginning on
2 the day after the date of the most recent election for the specific office or seat that
3 a candidate is seeking and ending on the date of the next election for that office or
4 seat. *Id.* Primary elections and general elections are considered to be separate
5 election cycles and a runoff election is considered to be part of the election cycle
6 of the election that necessitated the runoff. *Id.*

7 Accordingly, for candidates in the Special General Election, the election
8 cycle began on November 3, 2004, the day after the last general election, and ends
9 on April 11, 2006, the day of the Special General Election. *See* 2 U.S.C. 431(25)
10 and 11 CFR 400.2(a). If no winner is declared on April 11th, the Special General
11 election cycle still began on November 3, 2004, but ends on June 6, 2006, the date
12 of the Special Runoff Election. *Id.* For candidates in the Special General
13 Election who are also in the Primary Election, the election cycle for the Primary
14 Election commences on April 12, 2006, the day after the Special General
15 Election, and ends on June 6, 2006, the date of the Primary Election.² *Id.*

16 An expenditure from personal funds³ made during a particular election
17 cycle is made for the purpose of influencing that election, unless designated for a
18 different election campaign on FEC Form 3Z-1. *See* 11 CFR 104.19. An
19 expenditure from personal funds is considered made on the date the funds are
20 deposited into the account designated by the candidate's authorized committee as

² The relevant election cycle for candidates participating only in the Primary Election (*i.e.*, who are not running in the Special General Election) began on November 3, 2004 and ends on June 6, 2006.

³ *See* 11 CFR 400.4 for definition of "expenditure from personal funds." *See also* 2 U.S.C. 441a-1(b)(1)(A).

1 the campaign depository, under 11 CFR 103.1 and 103.2, on the date the
2 instrument transferring the funds is signed, or on the date the contract obligating
3 the personal funds is executed, whichever is earlier. 11 CFR 400.4(b).

4 The discussion below describes how the Millionaires' Amendment
5 regulations apply during the Special General and Primary election cycles.

6 *Special General Election Cycle: November 3, 2004 – April 11, 2006*

7 Candidates participating in the Special General Election must aggregate
8 all expenditures from personal funds made during the Special General Election
9 Cycle (November 3, 2004 through April 11, 2006). For purposes of the
10 Millionaires' Amendment those expenditures are considered expenditures for the
11 Special General Election. See discussion supra; 2 U.S.C. 431(25) and 11 CFR
12 400.2(a). Thus, if Ms. Busby's total expenditures from personal funds exceed
13 \$350,000 at any time during the Special General Election Cycle, the Committee
14 must, within 24 hours, file with the Commission an Initial Notification of
15 Expenditures from Personal Funds ("Initial Notification") on FEC Form 10. See
16 11 CFR 400.21(b) and 400.24(b). The Committee must also send a copy of this
17 form to *all* candidates running in the Special General Election and to the national
18 party committees of those candidates. See *id.* After filing an Initial Notification,
19 every time Ms. Busby's expenditures from personal funds aggregate in excess of
20 \$10,000, the Committee must, within 24 hours, file with the Commission an
21 Additional Notification of Expenditures from Personal Funds ("Additional
22 Notification") on FEC Form 10 and send a copy of that form to those who

1 received copies of the Initial Notification. *See* 11 CFR 400.22(b) and 400.24(b).
2 During the Special General Election Cycle, Ms. Busby and the Committee are not
3 required to send a copy of FEC Form 10 to any opposing candidates in the
4 Primary Election or to their national party committees, unless those opposing
5 candidates are also participating in the Special General Election.⁴

6 If the Committee receives a copy of FEC Form 10 filed by one of Ms.
7 Busby's opponents in the Special General Election before April 11, 2006, the
8 Committee must calculate the "opposition personal funds amount" to determine
9 whether it qualifies for increased individual contributions and increased
10 coordinated party expenditures. *See* 11 CFR 400.30(b)(1) and 400.10 (defining
11 "opposition personal funds amount"). The Committee may also obtain
12 constructive notification of the FEC Form 10 by downloading the form from the
13 FEC's website. *See* 11 CFR 400.30(b)(1), (d).

14 Likewise, for Millionaires' Amendment purposes, any personal
15 expenditures by Ms. Busby's opponents during the Special General Election
16 Cycle are also considered expenditures for the Special General Election. *See*
17 discussion *supra*; 2 U.S.C. 431(25) and 11 CFR 400.2(a). Therefore, for
18 Millionaires' Amendment purposes, if any of Ms. Busby's opponents in the
19 Special General Election files a FEC Form 10 with the Commission – even if the

⁴ The relevant election cycle for candidates participating only in the Primary Election (*i.e.*, who are not running in the Special General Election) began on November 3, 2004 and ends on June 6, 2006. During the Special General Election Cycle, candidates participating *only* in the Primary Election should aggregate all expenditures from personal funds and, if those expenditures aggregate in excess of \$350,000 prior to April 11, 2006, they should file FEC Form 10 with the Commission and send copies of that form to all opposing

1 opposing candidate designates the personal expenditure as in connection with the
2 Primary Election -- the expenditure is considered an expenditure for the Special
3 General Election. *Id.* Thus, Ms. Busby or the Committee may download that
4 FEC Form 10 (if they have not received it) and treat it as filed for the Special
5 General Election.

6 In calculating the opposition personal funds amount, the Committee would
7 normally take into account the gross receipts advantage as determined in FEC
8 Form 3Z-1 filed by each candidate in their 2005 Year End Report. *See* 11 CFR
9 400.10(a)(3). However, FEC Form 3Z-1 does not provide information regarding
10 gross receipts with respect to special elections. Thus, the Committee should not
11 include the gross receipts amounts in calculating the opposition personal funds
12 amount for the Special General Election Cycle. Consequently, the Committee
13 will calculate the opposition personal funds amount as follows: the opposing
14 candidate's aggregate expenditures from personal funds as of the date of
15 calculation minus Ms. Busby's aggregate expenditures from personal funds as of
16 the date of calculation. If the opposition personal funds amount makes the
17 Committee eligible for increased coordinated party expenditures (*i.e.*, if it exceeds
18 \$350,000), the Committee must file FEC Form 11 with the Commission and with
19 Ms. Busby's national and State party committees within 24 hours of receiving the
20 FEC Form 10. *See* 11 CFR 400.30(b)(2).

candidates who are also *only* participating in the Primary Election as well as to the national party committees of those candidates.

1 **If the Committee determines that it is eligible to receive increased**
2 **individual contributions, it may begin soliciting contributions up to \$6,300 per**
3 **individual contributor (three times the current individual contribution limit of**
4 **\$2,100) for use only during the Special General Election Cycle. See 2 U.S.C.**
5 **441a-1(a)(1)(A) and 11 CFR 400.41. The Committee must stop accepting such**
6 **increased contributions during the Special General Election Cycle, however, if:**
7 **(1) it reaches the proportionality provision limit; (2) Ms. Busby's own**
8 **expenditures from personal funds make her ineligible for increased limits; or (3)**
9 **the opposing candidate whose expenditures from personal funds entitled the**
10 **Committee to receive increased contributions ceases to be a candidate.⁵ See 2**
11 **U.S.C. 441a-1(a)(1) and (a)(3); 11 CFR 400.31 and 400.32.**

12 **The manner in which the provisions of the Millionaires' Amendment will**
13 **apply between April 12, 2006, and June 6, 2006, depends on the outcome of the**
14 **Special General Election. If one candidate receives a majority of the votes on**
15 **April 11, 2006, then no Special General Runoff will occur. If no candidate**
16 **receives a majority of the votes, however, the Special General Runoff will take**
17 **place on the same date as the Primary Election. The application of the**
18 **Millionaires' Amendment's provisions to each of these two scenarios is discussed**
19 **below.**

20

21

⁵ The Committee could also continue to accept increased contributions if another opposing candidate

1 ***Scenario 1 – No Special General Runoff: April 12 – June 6, 2006***

2 If one candidate wins the Special General Election and no Special General
3 Runoff takes place, then the Special General Election Cycle will end on April 11,
4 2006. For those candidates that participated in the Special General Election, the
5 Primary Election Cycle will begin on April 12, 2006. Accordingly, the
6 Committee must dispose of all “excess contributions”⁶ it received during the
7 Special General Election Cycle within 50 days after April 11, 2006. *See* 2 U.S.C.
8 441a-1(a)(4) and 11 CFR 400.51. It may not spend any of these excess
9 contributions on the Primary Election, or any other election, and it may not seek
10 to have any such excess contributions redesignated by the contributors for the
11 Primary Election or for any other election. *See* 2 U.S.C. 441a-1(a)(4); 11 CFR
12 400.50, 400.51, 400.52, 400.53, and 400.54.

13 Under 11 CFR 110.3(c)(3), any carryover of unused funds from one
14 election cycle to another (or from a previous Federal campaign committee to a
15 current Federal campaign committee) is a transfer, regardless of whether the
16 candidate maintains different committees or different campaign accounts for
17 different elections. Any portion of Ms. Busby’s expenditures from personal funds
18 that was not used for expenses in the Special General Election Cycle that is
19 transferred to the Primary Election Cycle under 11 CFR 110.3(c)(3) will be
20 considered an expenditure from personal funds for the Primary Election. Ms.

remaining in the Special General Election made sufficient expenditures from personal funds to entitle the Committee to do so.

⁶ “Excess contributions” are contributions made at the increased limit but not spent in connection with the election to which they relate. *See* 2 U.S.C. 441a-1(a)(4) and 11 CFR 400.50.

1 Busby and/or the Committee must use a reasonable accounting method such as
2 the one described in 11 CFR 110.3(c)(4) to determine the portion of the amount
3 transferred that constitutes the candidate's personal funds.

4 In the case of such a transfer, the date the expenditure from personal funds
5 is made is the date the funds are transferred to the Primary Election Cycle, *i.e.*,
6 April 12, 2006. If the aggregate of the transferred funds and other expenditures
7 from personal funds for the Primary Election Cycle exceeds \$350,000, Ms. Busby
8 will trigger the Millionaires' Amendment for the Primary Election and must file
9 an Initial Notification on FEC Form 10 with the Commission and with all
10 opposing candidates in the Democratic Primary Election. This Initial Notification
11 must be filed by April 13, 2006. See 11 CFR 400.21(b) and 400.24(b).

12 On April 12, 2006, the Committee should check the Commission's
13 website to see if any of Ms. Busby's Democratic opponents in the Primary
14 Election who did not also participate in the Special General Election filed any
15 FEC Form 10s with the Commission between November 3, 2004 and April 11,
16 2006. If any such opposing candidates did file one or more FEC Form 10s, the
17 Committee will obtain constructive notification of such filings as of the date on or
18 after April 12, 2006 that it downloads the opposing candidate's FEC Form 10s.
19 Once it downloads the form(s), the Committee should determine whether it is
20 eligible for increased contributions from individuals for the Primary Election
21 Cycle.⁷

⁷ The spending of Ms. Busby's opponents in the Primary Election Cycle will not trigger an increased party coordinated expenditure limit, because party committees cannot make coordinated party expenditures in

1 **The Primary Election Cycle is a separate and distinct election cycle from**
2 **the Special General Election Cycle. Thus, in calculating the opposition personal**
3 **funds amount, expenditures from personal funds made during the Special General**
4 **Election Cycle by any candidate running in the Special General Election must not**
5 **be aggregated with expenditures from personal funds made during the Primary**
6 **Election Cycle. Additionally, in calculating the opposition personal funds amount**
7 **for the Primary Election Cycle, the Committee must include the gross receipts as**
8 **reported in FEC Form 3Z-1 in the 2005 Year End reports. See 11 CFR**
9 **400.10(a)(3). Ms. Busby and the Committee must comply with the Millionaires’**
10 **Amendment regulations set forth in 11 CFR part 400 as they normally would in**
11 **any primary election.**

12 *Scenario 2 – Special General Runoff & Primary: April 12 – June 6, 2006*

13 **If no candidate receives a majority of votes in the Special General Election**
14 **on April 11, 2006, California will hold a Special General Runoff on June 6, 2006,**
15 **the same date as the Primary Election. Under this scenario, between April 12,**
16 **2006 and June 6, 2006, candidates participating in both the Special General**
17 **Runoff and the Primary Election will technically be in simultaneous election**
18 **cycles: the continuation of the Special General Election Cycle that began on**
19 **November 3, 2004 and the Primary Election Cycle.**

20 **As stated by Senator DeWine during consideration of the Millionaire’s**
21 **Amendment, “This amendment attempts to bring about equity and fairness and**

connection with a primary election campaign, only in connection with a general election campaign. See 2 U.S.C. 441a(d) and 11 CFR 400.30(c)(1).

1 also, quite candidly, to increase the opportunity for all candidates to get their
2 ideas to the public." See 147 CR S2537 (daily ed. March 20, 2001) (Sen.
3 DeWine). Under the novel facts presented here, including the treatment of special
4 elections under California law, while those candidates are technically running in
5 two simultaneous election cycles, because the Special General Runoff and
6 Primary Election date and office sought are precisely the same, the purposes of
7 the Millionaires' Amendment are best effectuated by designating all personal
8 expenditures by a candidate to both elections in which the candidate is
9 participating.⁸ Otherwise, for purposes of the Millionaires' Amendment, a
10 candidate in both elections could split his or her expenditures between the
11 elections, and effectively double the personal funds threshold for filing the Initial
12 Notification from \$350,000 to \$700,000.

13 Consequently, if Ms. Busby participates in both the Special General
14 Runoff and the Primary Election, her expenditures from personal funds between
15 April 12, 2006, and June 6, 2006, will count toward both elections. For example,
16 if she makes a \$400,000 expenditure from personal funds during this time frame,
17 that expenditure will be considered a \$400,000 expenditure from personal funds
18 in connection with the Special General Runoff, as well as a \$400,000 expenditure
19 from personal funds in connection with the Primary Election.⁹ Those

⁸ This conclusion is limited to the specific circumstances seen here, where no candidate running in the Special General Runoff will be running against the same opposing candidate in *both* the Special General Runoff and the Primary Election.

⁹ In this example, with respect to Ms. Busby's Special General Runoff opponents, the Committee must aggregate all of her expenditures from personal funds made prior to April 12 with those made on or after April 12. With respect to Ms. Busby's Primary Election opponents, however, the Committee must aggregate only those expenditures from personal funds made between April 12 and June 6, 2006.

1 expenditures must be aggregated with all expenditures from personal funds
2 previously made by Ms. Busby during the Special General Election Cycle
3 beginning on November 3, 2004, regardless of whether those expenditures are
4 attributed to the Special General Election or the Primary Election.

5 The Committee must file the appropriate notification that may result from
6 the aggregation (*e.g.* Initial Notification or Additional Notification). Expenditures
7 from personal funds must also be used to calculate the opposition personal funds
8 amount with regard to the Primary Election. This calculation must also take into
9 account the gross receipts amounts on FEC Form 3Z-1 filed with the 2005 Year
10 End reports.

11 Likewise, if any of Ms. Busby's opponents in the Special General Runoff
12 makes expenditures from personal funds between April 12th and June 6th, the
13 Committee should count those expenditures against the opponent's threshold for
14 the Special General Runoff, regardless of whether the opponent designates the
15 personal expenditures to his or her Special General Runoff or Primary Election
16 accounts. In calculating the opposition personal funds amount, the Committee
17 must aggregate all expenditures from personal funds made during the Special
18 General Election Cycle (November 3, 2003 to June 6, 2006), including
19 expenditures designated to the Committee's Primary election account. However,
20 the Committee should not include gross receipts amounts in this calculation
21 because these amounts are attributed entirely to the Primary Election and not to
22 the Special General Runoff.

